IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

INDIANA BELL TELEPHONE COMPANY, INCORPORATED d/b/a AMERITECH INDIANA, Plaintiff-Appellant, Cross-Appellee v. WILLIAM D. MCCARTY, DAVID W. HADLEY, DAVID E. ZEIGNER, in their capacity as Commissioners of the Indiana Utility Regulatory Commission and Not as Individuals, Defendants-Appellees, Cross-Appellants, and AT&T COMMUNICATIONS OF INDIANA, GP, and TCG INDIANAPOLIS, Defendants-Appellees Cross-Appellants	On Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division No. 01 C 1690 Hon. Larry J. McKinney, Presiding

COMBINED RESPONSE BRIEF AND REPLY BRIEF OF PLAINTIFF-APPELLANT, CROSS-APPELLEE AMERITECH INDIANA

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Indiana Bell Telephone Company, Inc. ("Ameritech") respectfully submits this brief, which both responds to the arguments made by AT&T and the Indiana Utility Regulatory Commissioners ("IURC") (collectively, "AT&T") in their appeals and replies to AT&T in support of the issues raised in Ameritech's appeal.

JURISDICTIONAL STATEMENT

Cross-appellants' jurisdictional statement is complete and correct.

RESPONSE TO AT&T'S APPEAL

I. The District Court's Rulings On UNE Combinations, Packet Switching And Acceptance Testing Simply Enforce The Clear Dictates of Federal Law.

AT&T challenges the district court's decisions on three issues. First, in light of a Supreme Court opinion issued in the midst of briefing at the district court, the court required the IURC to reconsider the provisions in the interconnection agreement that govern Ameritech's duty to combine unbundled network elements ("UNEs") for AT&T. A7. Second, the district court enjoined and remanded the IURC's requirement that Ameritech provide unbundled packet switching as part of such UNE combinations, finding that the IURC had failed to apply the Federal Communications Commission ("FCC") rule that governed when packet switching had to be unbundled. A8. Third, the district court reversed the IURC's requirement that Ameritech perform "acceptance testing" for AT&T, on the ground that Ameritech does not perform such testing for its own retail customers and, therefore, this was a "superior quality" requirement that violated the 1996 Act. A16-17. AT&T's challenges lack merit because all the district court did was enforce the plain dictates of federal law under the 1996 Act and FCC rules, which undeniably are binding on the IURC and must be enforced in interconnection agreements.

A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REMANDING FOR RECONSIDERATION OF THE UNE COMBINATION PROVISIONS BASED ON A SUBSEQUENT SUPREME COURT DECISION.

The IURC ordered Ameritech to include provisions in the interconnection agreement that required it both to refrain from separating UNEs that are already combined ("existing" combinations) and to do the work needed to combine UNEs upon AT&T's request ("new" combinations). SA45-48. Ameritech sought review of that decision. Midway through the district court briefing, however, the Supreme Court issued its opinion in *Verizon Comms. Inc. v. FCC*, 535 U.S. 467 (2002). That decision upheld the FCC rules requiring incumbent LECs to combine UNEs for competing carriers (47 C.F.R. §§ 51.315(c) and (d) ("Rules 315(c) and (d)"), but repeatedly emphasized that "the duties imposed under the rules are subject to restrictions limiting the burdens placed on the incumbents." 535 U.S. at 535. In particular:

- An incumbent's duty to combine UNEs for a competitor "only arises when the entrant is unable to do the job itself." *Id.*
- An incumbent's obligation, when it exists, is only to "perform the functions necessary to combine [the UNEs], not necessarily to complete the actual combination." *Id*. (internal quotation marks omitted).
- The competing carrier "must pay a reasonable cost-based fee for whatever the incumbent does" in order to combine the UNEs requested. *Id*. (internal quotation marks omitted).
- "[T]he incumbent's duty arises only if the requested combination does not discriminate against other carriers by impeding their access [to the incumbents' network], and only if the requested combination is technically feasible." *Id.* (internal quotation marks omitted).

The district court found that "[w]hile the interconnection agreement complies with the Act by requiring Ameritech to provide AT&T new UNE combinations, the agreement does not reflect the limitations on Ameritech's duty as recently set forth by the Supreme Court. In that sense, the agreement is not consistent with the Act." A7. The court therefore remanded to the

IURC "for further consideration in light of the Supreme Court's interpretation in *Verizon* . . . of Rules 315(c) and (d)," and stated that "the parties are ordered to reform the Agreement accordingly." *Id.*

AT&T opposes the remand, asserting that (i) Ameritech somehow waived its right to request a remand in light of *Verizon*; (ii) the interconnection agreement already includes all the "relevant" limitations recognized in *Verizon*; and (iii) *Verizon* is irrelevant because the limits of federal law do not apply to state commissions. None of these claims has merit.

As a threshold matter, the only possible ground for reversing the district court's decision to remand would be if it were an abuse of discretion. *Nelson v. Apfel*, 210 F.3d 799, 801-02 (7th Cir. 2000). AT&T does not (and cannot seriously) claim that the district court abused its discretion here. The IURC's task in arbitrating and approving interconnection agreements is to determine compliance with federal law (47 U.S.C. § 252(e)(1), (2), and (6)), and it can hardly complain about the district court requiring it to apply *Verizon*. As for AT&T, if it is correct that the interconnection agreement already complies with *Verizon* (see AT&T Br. 24-25), it can prove that to the IURC on remand. If, however, the agreement does not currently comply with *Verizon*, AT&T can hardly complain about having to revise it. AT&T has no right to an interconnection agreement that violates or is inconsistent with federal law. See 47 U.S.C. § 252(e)(2) and (6).

AT&T's first claim is that Ameritech waived any right to remand because, during the arbitration proceeding before the IURC, it did not oppose AT&T's proposed contract language on the specific ground that the language failed to incorporate the limitations recognized in *Verizon*. AT&T Br. 22-23. That argument is baseless because *Verizon* did not come out until well after the IURC proceeding ended and after Ameritech filed its opening brief in the district

court. As this Court has held, "where the Supreme Court decides a relevant case while litigation is pending, omission of an argument based on the Supreme Court's reasoning does not amount to a waiver." *Old Ben Coal Co. v. Director, OWCP*, 62 F.3d 1003, 1007 (7th Cir. 1995) (internal quotation marks omitted). And of particular relevance here, the Court further explained that "waiver is a flexible doctrine, . . . so that when all the claimant asks for is a remand to permit the agency to consider an intervening decision – a decision the agency couldn't have considered earlier – the doctrine does not stand in the way." *Id.* (internal quotation marks omitted). All Ameritech asked the district court to do was "remand to consider an intervening decision," so AT&T's waiver argument fails.[1]

AT&T's second argument is that the district court's decision to remand was "simply wrong" because the interconnection agreement already includes any "relevant" limitations on Ameritech's duty to combine UNEs. AT&T Br. 23-24. On the very next page, however, AT&T concedes that the interconnection agreement omits one of the most critical limitations of *Verizon*, in that it "does not limit Ameritech's duty to situations where the 'CLEC is unable to do the combining itself.'" *Id.* 25. That alone is reason for remand.

AT&T seeks to evade this inconsistency with federal law by asserting that *Verizon* "did not hold that [Ameritech's duty to combine UNEs] applies only when it is separately

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[1] In addition, AT&T's claim that Ameritech did not oppose AT&T's proposed contract language on UNE combinations (AT&T Br. 23-24) is incorrect. At the time of the arbitration, the Eighth Circuit, proceeding under the Hobbs Act (28 U.S.C. § 2342(1)) as the sole appellate court with authority to review the FCC's rules on UNE combinations, had held that the FCC's rules requiring new combinations violated the 1996 Act and were unlawful. *Iowa Utils Bdv. v. FCC*, 219 F.3d 744, 758-59 (8th Cir. 2000) ("*IUB III*") *aff'd in part and rev'd in part by Verizon, supra*. Based on that decision, Ameritech argued that federal law prohibited the imposition of *any* duty to combine UNEs for CLECs, and thus opposed *all* of AT&T's language on new UNE combinations. See SA45, SA399-403.

demonstrated that the CLEC is unable to effect the combination." *Id*. 26. But that is exactly what *Verizon* held: "An obligation on the part of the incumbent to combine elements for an entrant under Rules 315(c) and (d) *only arises when the entrant is unable to do the job itself*." *Verizon*, 535 U.S. at 535 (emphasis added). Indeed, this limitation is so important that the Supreme Court repeated it four times.[2] AT&T is not entitled to an interconnection agreement that does not include that limitation.[3]

AT&T also concedes that the interconnection agreement "does not contain requirements of technical feasibility" and does not "merely [require Ameritech] to provide the functions necessary to make the combinations." AT&T Br. 29. Under *Verizon* and Rule 315, however, an incumbent is required to combine UNEs only where technically feasible, and it fulfills its obligations under federal law by providing the functions necessary to make the combinations even if it does not actually complete the combination. 535 U.S. at 535. By failing to include those limitations on the scope of Ameritech's duty, the interconnection agreement again runs afoul of *Verizon* and FCC Rule 315(c).

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[2] 535 U.S. at 534 (the situation in which a CLEC "is unable to make the combination" itself is one of the "only instances in which the additional combination rules obligate the incumbents" to combine UNEs); *id*. at 535 ("An obligation on the part of the incumbent to combine elements for an entrant under Rules 315(c) and (d) only arises when the entrant is unable to do the job itself"); *id*. at 538 ("[T]he FCC has interpreted [Rule 315(c)] as obligating the incumbent to combine '[i]f the carrier is unable to combine the elements.'"); *id*. ("In sum, what we have are rules that say an incumbent shall, for payment, . . . combine network elements to put a competing carrier on an equal footing with the incumbent when the requesting carrier is unable to combine").

[3] AT&T also claims that the arbitration record before the IURC showed that AT&T will never be able to combine UNEs for itself. AT&T Br. 27. The question whether AT&T can complete any particular type of UNE combination by itself, however, is a case-by-case question that cannot be answered in the abstract.

AT&T argues that this inconsistency with *Verizon* is permissible because the contract provision at issue deals with "ordinary" UNE combinations and that the limits on an incumbent's duty do not apply where "ordinary" combinations are involved. AT&T Br. 28-29. But an "ordinary" combination is still a *new* combination, *i.e.*, one that does not yet exist at the time the competitor orders it, and the limitations of *Verizon* and the FCC's rules apply in all instances where an incumbent is asked to combine UNEs for a CLEC, whether the combination is "ordinary" or not. See 47 C.F.R. § 51.315(c).[4]

AT&T's final argument is that it does not matter that *Verizon* and the FCC's rules and orders "contain[] relevant limitations that are not reflected in the IURC's combination requirements," because a state commission can do whatever it likes so long as it ultimately promotes the goals of the 1996 Act. AT&T Br. 30-31. As explained in more detail below (*see infra*, pp. 17-18), however, merely purporting to serve the same general goals as the 1996 Act does not save a state rule from preemption. Any state regulation on matters covered by the 1996 Act must "hew to" the lines drawn by the 1996 Act, the FCC's implementing regulations, and federal court decisions interpreting the Act and those regulations. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). The lines drawn by *Verizon* are clear, and AT&T admits that the interconnection agreement's provisions on UNE combinations do not hew to those lines. The district court's remand was therefore entirely appropriate.

[4] AT&T also asserts that "ordinary" combinations are unlikely to raise issues of technical feasibility. AT&T Br. 30. The time to evaluate such questions is when the particular combination is actually requested, not in the abstract.

B. THE DISTRICT COURT WAS CORRECT TO REVERSE THE IURC FOR FAILING TO APPLY THE FCC'S REGULATION ON PACKET SWITCHING.

At the time the interconnection agreement was arbitrated, the FCC's rules required incumbent LECs to unbundle a network element known as "packet switching," but only in the limited situation where four specific conditions were met. 47 C.F.R. § 51.319(c)(5)(i)-(iv) (1999) (vacated)[5] (the "packet switching rule"). The IURC, however, approved an interconnection agreement provision that required Ameritech to provide unbundled packet switching as part of UNE combinations *regardless of* whether the four conditions of the FCC's packet switching rule were met. A8. The district court enjoined that portion of the interconnection agreement because the IURC had required the unbundling of packet switching without even considering the requirements of the FCC's rule, and "the IURC cannot act contrary to FCC rules." *Id*.

AT&T tries to excuse the IURC's failure to apply the FCC's packet switching rule. Its claims, however, are both erroneous and moot. They are moot because the FCC recently voted to adopt new rules under which incumbent LECs are not required to unbundle their packet switching facilities in any circumstances.[6] That decision preempts and prohibits any state-

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[5] All of the FCC's 1999 unbundling rules were vacated by the D.C. Circuit in *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428, 430 (D.C. Cir. 2002) ("*USTA*"), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n*, 123 U.S. 1571 (2003). As explained in the text and the following footnote, those rules are being replaced by the FCC's new unbundling rules and order. See SA454-59.

[6] News Release, "FCC Adopts New Rules for Network Element Unbundling Obligations of Incumbent Local Phone Carriers," Feb. 20, 2003, Attachment at 1 (SA456) ("Incumbent LECs are not required to unbundle packet switching, including routers and DSLAMs, as a stand-alone network element. The order eliminates the current limited requirement for unbundling of packet switching"); *id*. Attachment at 2 (SA457) ("There are no unbundling requirements for the packet-switching features, functions, and capabilities of incumbent LEC loops."). As of the filing of cont'd)

imposed requirement to unbundle packet switching. *See AT&T Corp.*, 525 U.S. at 379 n.6; *United States v. Locke*, 529 U.S. 89, 110 (2000) (a federal determination that "no . . . regulation is appropriate or approved pursuant to the policy of the statute" preempts the states from "enact[ing] such a regulation");[7] *US West Comms. v. Jennings*, 304 F.3d 950, 958 (9th Cir. 2002) (appellate court "is required to apply all valid, implementing FCC regulations now in effect – including those . . . newly promulgated.")

AT&T ignores both the FCC's new packet switching decision and the IURC's failure to apply the FCC's old packet switching rule. Instead, it argues that state commissions can order packet switching to be unbundled under state law, even in circumstances where the FCC has expressly concluded that the 1996 Act does not permit any such requirement. AT&T Br. 36. That argument fails. The Act and established preemption law require any state regulation on matters addressed by the Act, such as unbundling, to be "consistent with" and not undermine the FCC's rules and policy decisions on the issue. 47 U.S.C. §§ 251(d)(3), 261(b) and 261(c); *AT&T Corp.*, 525 U.S. at 379 n.6; *see infra*, pp. 15-17. What could be more inconsistent with federal law than imposing the very requirement that the FCC has already found to exceed the permissible limits of federal law?

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this brief the FCC has not released the actual text of its new order and rules, but it is expected to do so in the near future.

[7] *See also Astroline Comms. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988) (reversing agency decision that failed "to proceed analytically according to the statutory inquiry" and "fail[ed] even to cite" the governing provision); Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 157 (rel. Nov. 5, 1999), *rev'd on other grounds by USTA*, *supra* (where FCC "ha[s] made an affirmative finding as to whether or not the particular element now satisfies the unbundling standards of the Act," allowing state decisions that reach the opposite conclusion "would 'substantially prevent implementation of the requirements of section 251,' as prohibited by subsections 251(d)(3)(C).").

In any event, AT&T's erroneous claims about the scope of state authority under the 1996 Act are irrelevant, because the IURC did not rely on state law in requiring Ameritech to unbundle packet switching as part of UNE combinations. Indeed, a basic point of the district court's decision was that the IURC had required the unbundling of packet switching without applying any law at all. An agency decision can be affirmed, if at all, only on the grounds that the agency relied on, not on appellate counsel's post hoc rationalizations. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *Bagdonas v. Department of Treasury*, 93 F.3d 422, 426 (7th Cir. 1996).

C. THE DISTRICT COURT PROPERLY HELD THAT THE IURC'S ACCEPTANCE TESTING REQUIREMENT VIOLATED THE 1996 ACT'S PROHIBITION ON "SUPERIOR QUALITY" REQUIREMENTS.

The 1996 Act requires an incumbent LEC to provide competing carriers with interconnection that is "at least equal to" what it provides to itself and with access to UNEs that is "nondiscriminatory." 47 U.S.C. §§ 251(c)(2) and (c)(3). The FCC originally interpreted this language to permit rules that forced incumbent LECs to provide interconnection and UNEs to competitors that were superior in quality to what the incumbent would provide to itself. *Iowa Utils Bd. v. FCC*, 120 F.3d 753, 812 (8th Cir. 1997) ("*IUB I*"), *aff'd in part and rev'd in part on other grounds by AT&T Corp.*, *supra*. In its capacity as the Hobbs Act reviewing court, the Eighth Circuit held, twice, that any such "superior quality" rules "violate the plain language of the Act." *IUB III*, 219 F.3d at 758; *IUB I*, 120 F.3d at 812-13 (a superior quality rule "violate[s] the plain terms of the Act").

In the arbitration before the IURC, AT&T sought to require Ameritech to perform "acceptance testing" (more precisely, noise and frequency response testing, which helps determine the capabilities of a loop for certain kinds of services) when installing unbundled

loops ordered by AT&T. SA76. Ameritech opposed AT&T's request on the ground that Ameritech "would not perform such tests for a retail customer," and that AT&T was therefore seeking an unlawful "superior quality" requirement. *Id*. The IURC did not dispute that AT&T sought a superior quality requirement, but imposed it anyway, asserting that such a requirement was "in the public interest" and would "facilitate competition." *Id*. The IURC's rationale was that even though the 1996 Act did not allow the *FCC* to impose superior quality requirements, state commissions could impose the identical requirements in the name of competition and still be consistent with the Act. SA76-78.

The district court succinctly rejected that argument:

> The IURC ordered Ameritech to perform a noise and frequency response test before opening a loop circuit, even recognizing that such tests are superior quality. Arbitration Order at 76-78. Superior quality requirements "violate the plain language of the Act." *Iowa Util. Bd.*, 219 F.3d at 758. The IURC understands this, but concluded that state commissions can order requirements that "violate" the Act, as long as the requirements do not "conflict" with the Act. *See* Arbitration Order at 77-78. The Court fails to see the difference. A state commission's arbitration determinations must "meet the requirements of" the Act. 47 U.S.C. § 252(e)(6). It is difficult to conceive how a determination could violate the Act, but meet the requirements of it.

A16. That analysis is unassailable. Nevertheless, AT&T challenges the district court's ruling on three grounds, none of which has any legal or logical footing.

First, AT&T claims that "the Eighth Circuit's interpretation of the Act was repudiated in *Verizon*." AT&T Br. 33. *Verizon*, however, did not address superior quality requirements at all, because no party ever sought certiorari to challenge the Eighth Circuit's rulings on that issue. The Supreme Court cannot be assumed to have overruled the Eighth Circuit by inference. Furthermore, having failed to even seek review of the Eighth Circuit's superior-quality rulings, AT&T and the IURC – both of whom, like Ameritech, were parties to the proceedings in the Eighth Circuit – cannot, as a matter of law, collaterally challenge those rulings here. *FCC v. ITT*

World Comms., Inc., 466 U.S. 463, 468 (1984) (collateral attack); *Parklane Hosiery v. Shore*, 439 U.S. 322, 329 (1979) (collateral estoppel).

Second, AT&T argues that even if it violates the 1996 Act for the *FCC* to impose superior quality requirements, that does not mean it violates the Act for a state commission to impose such requirements. AT&T Br. 34. To state the argument is to refute it: How could a state commission simultaneously violate the Act and be "consistent with" it? And how could it be that the FCC lacks "power to issue regulations contrary to the plain language of the Act" (*IUB III*, 219 F.3d at 757), but state commissions would have such power? If anything, state commissions have *less* authority than the FCC to interpret the 1996 Act. *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) ("A state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation"). Thus, AT&T's claim that a state commission can do precisely what the FCC is forbidden to do is baseless.[8]

Third, AT&T claims that section 252(e)(3) of the Act (47 U.S.C. § 252(e)(3)) somehow allows state-imposed superior quality requirements. AT&T Br. 35. Section 252(e)(3), however,

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[8] AT&T makes a similar argument in a footnote, asserting that "the Hobbs Act does not require this Court to accept the Eighth Circuit's interpretation of the Act," because that decision does nothing more than prevent this Court from enforcing the FCC rules that the Eighth Circuit rejected. AT&T Br. 33 n.12. That argument ignores the central function of the Hobbs Act, which consolidates review of federal agency regulations in a single court of appeals, whose decision is immune from collateral attack, in order to "avoid the possibility of conflicting litigation where two courts have concurrent jurisdiction to resolve the same issue." *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 907 (8th Cir. 1984), *vacated on unrelated grounds*, 476 U.S. 1167 (1986). If different circuits, in reviewing state commission decisions, could interpret the 1996 Act in ways contrary to the Hobbs Act court, it would not only be an unlawful collateral attack, but also would mean that state commissions in different circuits could be granted widely differing authority under the same 1996 Act and same FCC rules. That result would destroy the uniformity sought by the Hobbs Act and undermine the "national policy framework" that Congress sought to create under the 1996 Act (see H.R. Rep. No. 104-458 at 1, 113 (Preamble to 1996 Act)).

deals with "telecommunications services quality standards or requirements," such as how quickly a service outage must be repaired or what percentage of calls can be blocked during the busy hour. See 170 Ind. Admin. Code §§ 7-1.2-1 through 7-1.2-18 (Indiana's service quality standards). The Act allows states to continue to enforce such standards via interconnection agreements. A duty to perform acceptance testing, however, is not a service quality standard that measures an incumbent LEC's performance; rather, it is an affirmative requirement to do a specific task for a specific carrier. Moreover, section 252(e)(3) was not the basis for the FCC's original superior quality rules or for the IURC's decision here (see SA76-78), so it has no relevance it has to this issue. *Motor Vehicle Mfrs.*, 463 U.S. at 50. If the IURC had thought section 252(e)(3) or Indiana's service quality standards applied here it presumably would have discussed or at least cited them in the arbitration order, but it did not.

In sum, AT&T's arguments on the acceptance testing issue are entirely without merit, and the district court's decision should be affirmed.

D. AT&T'S ARGUMENTS ON THE SCOPE OF STATE COMMISSION AUTHORITY MISSTATE THE ISSUE AND THE ESTABLISHED LAW OF CONFLICT PREEMPTION.

Finally, AT&T asserts that "the district court committed a single overarching error" with respect to all three issues discussed above, in that it "accepted Ameritech's claim that provisions of interconnection agreements are valid only if, and only to the extent that, an FCC regulation mandated the particular provision." AT&T Br. 17. This was error, AT&T claims, because "even if an FCC regulation does not require a provision, states can order it in an interconnection agreement to implement the [federal] statutory requirement that the terms of access be just, reasonable, and nondiscriminatory or to enforce or establish additional procompetitive requirements under state law." *Id*. AT&T misstates the issue, the facts, and the law.

1. THE IURC'S RULINGS ARE INCONSISTENT WITH THE 1996 ACT AND THE FCC'S RULES AND ARE THEREFORE BARRED BY THE ACT ITSELF AND ESTABLISHED PREEMPTION LAW.

The issue here is not whether the IURC can impose duties on Ameritech that the 1996 Act and FCC rules "do[] not [expressly] require." Rather, the issue is whether the IURC can impose duties on Ameritech that the conflict or are inconsistent with the 1996 Act or the FCC's rules implementing the Act. It cannot. The 1996 Act bars the states from imposing on incumbent local exchange carriers ("incumbent LECs") any duties that are "inconsistent with" federal law or that "substantially prevent implementation of the requirements of [section 251 of the Act] and the purposes of" the local competition provisions in the Act (47 U.S.C. §§ 251-61). 47 U.S.C. §§ 251(d)(3), 261(b) and (c). These provisions codify the established principles of "implied" or "conflict" preemption, which require state-imposed requirements to give way when they conflict with, undermine, frustrate, are inconsistent with, or otherwise interfere with the requirements of federal law or achievement of the goals and purposes of federal law. *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) ("Congress has clearly stated its intent to supersede laws that are inconsistent with the provisions of the [1996 Act]" or FCC rules); *Preemption of Certain Provisions of the Texas Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, ¶ 51 (rel. Oct. 1, 1996), *aff'd sub nom. City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (section 251(d)(3) "essentially restates the principles that would apply under the Supreme Court's general preemption jurisprudence").

The duty of state agencies to comply with the 1996 Act and FCC regulations is strict. As the Supreme Court explained, the 1996 Act establishes a "new federal regime" under which the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6

(1999). Thus, "[w]ith regard to the matters addressed by the Act," such as unbundling, state commissions are no longer "allowed to do their own thing." *Id*. Rather, the 1996 Act and the FCC's implementing regulations now "draw the lines to which [state commissions] must hew." *Id*. And if a state commission fails or refuses to "regulat[e] in accordance with federal policy," it is the task of the federal courts to "bring it to heel." *Id*. This Court has concurred, stating that under the 1996 Act, "Congress . . . has precluded all other regulation except on its terms." *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001). Circuits across the nation uniformly share that view.[9]

Recognizing the supremacy of federal law in this area, the district court enjoined and/or remanded the IURC-imposed requirements that were inconsistent with the 1996 Act and the FCC's rules. AT&T challenges those holdings, arguing that in each instance the IURC's requirements, though not expressly authorized by the 1996 Act or any FCC rule, were

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[9] *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 and n.10 (9th Cir. 2003) ("The 1996 Act . . . granted the FCC regulatory authority over those intrastate matters governed by the Act," and "[u]nder this new scheme, the state commissions are . . . confined to the role that the Act delineates."); *MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 511 (3d Cir. 2001), *cert. denied*, 123 S. Ct. 340 (2002) ("Through the Act's restructuring, the federal government has 'unquestionably' taken the regulation of local telecommunications competition away from the states"); *AT&T Comms. v. BellSouth Telecomms., Inc.*, 238 F.3d 636, 646 (5th Cir. 2001) ("Congress, by enacting the 1996 Act, . . . validly preempted the states' power to regulate local telecommunications competition. Accordingly, Congress established a federal system headed by the FCC to regulate local telecommunications competition."); *Southwestern Bell v. Connect Comms. Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000) ("The new regime for regulating competition in this industry is *federal* in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law."); *GTE North, Inc. v. Strand*, 209 F.3d 909, 923 (6th Cir. 2000) ("in administering the [1996 Act's] regulatory framework," state commissions "must operate strictly within the confines of the statute"); *MCI Telecomms. Corp. v. Public Serv. Comm'n*, 216 F.3d 929, 938 (10th Cir. 2000) ("[W]ith the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity."), *cert. denied*, 531 U.S. 1183 (2001).

nevertheless permissible because they were not expressly forbidden. AT&T Br. 19. AT&T asserts that state commissions can impose requirements on incumbent LECs that go beyond anything the FCC or Congress has imposed as long as such state-imposed requirements do not "violate some statutory provision." *Id*. That argument both misstates the law of preemption and ignores the facts here.

To begin with, preemption of state law arises either from federal statutes *or* from the federal agency's implementing regulations. *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less preemptive effect than federal statutes."); *City of New York v. FCC*, 486 U.S. 57, 64 (1988). Thus, the FCC's regulations on UNE combinations and packet switching have the same preemptive effect as the 1996 Act itself.

Furthermore, it is not necessary for state action to affirmatively "violate" some express provision of a federal statue or regulation in order to be preempted. The federal government does not have to expressly prohibit state action in order for preemption to apply, because preemption does not operate on the same principles as "Simon Says." Rather, "implied" or "conflict" preemption arises whenever state law effectively ignores the standards adopted by federal law, impedes achievement of the goals of federal law, or otherwise undermines the methods by which federal law seeks to achieve those goals. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873-74 (2000); *Boomer v. AT&T Corp.*, 309 F.3d 404, 417 (7th Cir. 2002); *Time Warner Cable v. Doyle*, 66 F.3d 867, 874-75 (7th Cir. 1994); 47 U.S.C. §§ 251(d)(3), 261(b) and (c). As the Supreme Court recently explained, state law is preempted whenever it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress – whether that obstacle goes by the name of conflicting; contrary to; …

repugnance; difference; irreconcilability; inconsistency; violation; curtailment; … interference, or the like." *Geier*, 529 U.S. at 873 (internal quotation marks omitted). Thus, conflict preemption is concerned with "conflict in its broadest sense." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959).

The conflict and inconsistency between the IURC's decisions and federal law on the issues appealed by AT&T is plain. Reduced to its essentials, AT&T's argument is that when federal law mandates that an incumbent LEC do X, a state commission could require the incumbent LEC to do X plus Y and still be "consistent with" federal law. See AT&T Br. 19. On each issue AT&T raises, however, federal law expressly requires Ameritech to do X *but not* Y. Specifically, FCC Rule 315(c) requires Ameritech to combine UNEs for competing carriers, *but not* when the competitor is able to make the combination itself. *Verizon*, 535 U.S. at 534-35, 538. Until recently the FCC required Ameritech to provide unbundled packet switching, *but not* if the four conditions of the FCC's packet switching rule were not met. 47 C.F.R. § 51.319(c)(5)(i)-(iv) (1999). And the 1996 Act requires Ameritech to provide UNEs to competitors in a nondiscriminatory manner, *but not* in a manner that is superior in quality to what Ameritech provides for itself or other carriers. *IUB I*, 120 F.3d at 812-13; *IUB III*, 219 F.3d at 757-58.[10] Yet, despite these federal limits on Ameritech's obligations, in each instance

[10] Further, at a more general level, allowing the IURC to impose requirements on Ameritech that the Congress and the FCC prohibit or have refused to impose would conflict with the requirements and purposes of the 1996 Act and the FCC's rules by (i) undermining Congress' goal of establishing a "national policy framework" for the development of local competition (H.R. Rep. No. 104-458 at 1,113 (Preamble to 1996 Act)); (ii) undermining Congress' decision to have the FCC alone establish the rules to implement the local competition provisions of the Act (47 U.S.C. § 251(d)(1) and (2)); (iii) undermining the balance of interests struck by the FCC in limiting the scope of its UNE-combination and packet switching rules; and (iv) creating the unwelcome specter of "mischievous conflict" that arises whenever state and cont'd)

the IURC went ahead and required Ameritech to do X *plus* Y anyway, thereby violating its duty to "hew to" the lines drawn by Congress, the courts, and the FCC. *AT&T Corp.*, 525 U.S. at 379 n.6. In these circumstances, "due regard for the federal enactment requires that state jurisdiction must yield." *Garmon*, 359 U.S. at 244. To use AT&T's own words, "[i]t is elementary that state law cannot require what federal law prohibits and that state laws that would do so are in direct conflict with federal law and are preempted."[11]

2. AT&T'S CLAIM THAT THE IURC-IMPOSED REQUIREMENTS SERVE THE SAME GENERAL GOALS AS THE 1996 ACT IS UNAVAILING.

It is no answer for AT&T to claim that the Act allows state commissions to impose requirements on incumbent LECs under color of state law as long as they purport to promote local telephone competition. AT&T Br. 18-19. Merely purporting to serve the same goals as federal law is not enough to save state action from preemption; indeed, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) (it is not enough that a state-imposed obligation "share[s] the same goals" as federal law, because "[t]he fact of a common end hardly neutralizes conflicting means"); *Locke*, 529 U.S. at 115 ("state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go"). As this Court has explained, federal "[s]tatutes do more than point in a direction, such as 'more

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federal authorities "lay hold of the same relationship for regulation." *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 775-76 (1947).

[11] Brief of AT&T Corp. in *Boomer v. AT&T Corp.*, No. 02-2667 (filed July 17, 2002) at 23 (SA461).

[competition].' They achieve a particular amount of that objective, at a particular cost in other interests. [Consequently], [a]n agency cannot treat a statute as authorizing an indefinite march in a single direction." *Contract Courier Services, Inc. v. Research and Special Programs Administration*, 924 F.2d 112, 115 (7th Cir. 1991).

This principle is especially important under the 1996 Act, where even the FCC's own rules have repeatedly been rejected for assuming that the Act allows the imposition of any requirement on incumbent LECs so long as it purports to promotes competition. Most recently, the D.C. Circuit applied this principle to strike down the FCC's 1999 unbundling rules, holding that the 1996 Act does not allow the FCC to rely on the "open-ended" assumption that "more unbundling is better." *USTA*, 290 F.3d at 425-29. Rather, the FCC must consider the costs unbundling imposes (such as reduced incentives to invest and innovate) and the impact of such costs on the overall goals of the Act, because unbundling requirements that go too far can easily harm competition rather than help it. *Id.*[12] If the FCC's authority to impose obligations on incumbent LECs under the 1996 Act is not "open-ended," then neither is a state commission's. See *GTE South*, 199 F.3d at 745.

3. THE CASES RELIED ON BY AT&T ARE INAPPOSITE.

The cases cited by AT&T do not defeat these established preemption principles. AT&T first cites decisions by the Ninth Circuit that upheld a state commission's approval of an interconnection agreement that required the incumbent LEC to combine UNEs for the CLEC,

[12] See also *AT&T Corp.*, 525 U.S. at 390-91 (rejecting FCC's 1996 unbundling rules and holding that "[t]he [FCC's] premise was wrong" when it assumed that "whatever requested element can be [unbundled] must be [unbundled]"); *GTE Service Corp. v. FCC*, 205 F.3d 416, 422-23 (D.C. Cir. 2000) (rejecting FCC's collocation rules as being "overly broad and disconnected from the statutory purpose" when the FCC failed to "limit" the scope of the incumbent's duty so as to avoid "an unnecessary taking of private property").

even though, at the time, the FCC's rules requiring incumbents to combine UNEs had been held unlawful. AT&T Br. 20. The Ninth Circuit reasoned that the rejection of the FCC's UNE-combination rules merely created a void in the law, and that in such circumstances nothing prevented the state commission from approving the very UNE-combining duties that the FCC had no power to impose. *Id*.

Those decisions are undeniably wrong, but also are irrelevant today. They are wrong because they mounted an unlawful collateral attack on the Eighth Circuit's then-binding holding that any UNE-combining requirement violated the 1996 Act. *IUB I*, 120 F.3d at 813. The Eighth Circuit reached that decision in its role as the Hobbs Act court under 28 U.S.C. § 2342(1), which gave it sole authority to review the FCC's UNE-combination requirements and determine if such requirements complied with the 1996 Act. The court's decision to reject those rules did not create a void for state commissions to fill; it drew a line that state commissions (and other courts) could not cross unless and until the Supreme Court subsequently reversed the Eighth Circuit.

More importantly for present purposes, the Ninth Circuit's decisions are irrelevant to this case. The district court here was not deciding whether the IURC could require Ameritech to combine UNEs in the absence of any FCC rule on the issue. Rather, it was deciding whether, in light of the Supreme Court's recognition of specific limits on an incumbent's duty to combine UNEs, limits that the IURC had never had a chance to consider, it made sense to remand the issue to the IURC for reconsideration. That is entirely different from the situation faced by the Ninth Circuit. Moreover, the Ninth Circuit has since properly recognized that "state commissions are . . . confined to the role that the Act delineates." *Pacific Bell*, 325 F.3d at 1126 n.10.

AT&T next cites a Fifth Circuit decision, but that too is irrelevant to this case. The decision cited by AT&T (at 20) involved one competing carrier opting into the UNE-combination provisions of another carrier's interconnection agreement under 47 U.S.C. § 252(i) after the incumbent had "agreed" to those provisions. *Southwestern Bell Tel Co. v. Waller Creek Comm*s., 222 F.3d 812, 816 (5th Cir. 2000). Nothing in the opinion suggests, much less holds, that a state commission may *impose* UNE-combining terms that conflict with the rules adopted by the FCC or that ignore an on-point Supreme Court decision. In fact, the Fifth Circuit has since properly found that "Congress, by enacting the 1996 Act, . . . validly preempted the states' power to regulate local telecommunications competition." *AT&T Comms.*, 238 F.3d at 646.

AT&T last relies on this Court's decision in *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 573 (7th Cir. 1999) for the proposition that simply because a federal law does not affirmatively require something does not necessarily mean that it prohibits it. AT&T Br. 20-21. As explained above, however, conflict preemption is not that limited. In *Illinois Bell* the court stated that, as to the issue being reviewed, federal law did "not set out specific conditions which one party could enforce against the other." 179 F.3d at 573. With regard to the issues here, by contrast, the Supreme Court, the FCC, and Congress have "set out specific conditions" on the duties faced by an incumbent LEC, and Ameritech has every right to "enforce them" in the interconnection agreement. State commission orders that ignore those limits and impose duties that violate them are patently preempted because, as this Court subsequently explained, Congress "did take over some aspects of the telecommunications industry" in the 1996 Act, and with respect to those areas "Congress . . . precluded all other regulation except on its [and the FCC's] terms." *MCI Telecomms.*, 222 F.3d at 342-43.

4. THE IURC CANNOT BE AFFIRMED ON GROUNDS IT DID NOT ACTUALLY RELY ON BELOW.

Finally, AT&T's arguments fails for a reason wholly apart from AT&T's misstating the law of preemption and ignoring the facts of this case. AT&T claims that the IURC's requirements were permissible because they were necessary to ensure "just, reasonable, and nondiscriminatory access" to UNEs under section 251(c)(3) of the Act (47 U.S.C. § 251(c)(3)) or were imposed under state law and were otherwise consistent with the purposes of the 1996 Act. AT&T Br. 18. That argument is wrong as a matter of law, as explained above, but it also misstates the grounds for the IURC's decisions. The IURC's decisions on UNE combinations, packet switching, and acceptance testing never even mentioned the "just, reasonable and nondiscriminatory access" language of section 251(c)(3), much less relied on it. See SA45-48, SA76-78. Similarly, the IURC's requirements to provide packet switching and acceptance testing did not rely on state law at all. Thus, even if AT&T's view of a state commission's authority under the 1996 Act were viable (which it is not, as explained above), it would not save the IURC's decisions. It is well established that an agency decision can be affirmed, if at all, only on the grounds actually relied on by the agency. *Motor Vehicle Mfrs.*, 463 U.S. at 50.

* * *

In sum, AT&T's arguments about the scope of state commission authority under the 1996 Act and FCC rules are both irrelevant to the issues here and refuted by established law of implied or conflict preemption.

REPLY IN SUPPORT OF AMERITECH'S APPEAL

II. The District Court Erred By Affirming, Based On The Wrong Legal Standard, The IURC's Award Of The Tandem Reciprocal Compensation Rate To AT&T.

In its opening brief, Ameritech demonstrated that:

(1) A competing LEC does not qualify to charge the tandem rate under FCC Rule 711(a)(3) by establishing only that its switch can serve a geographic area comparable to the incumbent's tandem switch; rather, the competing LEC must prove that its switch *does* serve such an area;

(2) The IURC, although purporting to apply Rule 711(a)(3), inquired only into the areas AT&T's switches can serve, and not into the areas they do serve; and

(3) The district court (a) erroneously concluded that the IURC was correct on the law merely because it accurately identified Rule 711(a)(3); (b) erroneously ignored the distinction between the area a switch can serve and the area a switch does serve, as well as Ameritech's arguments concerning that distinction; and (c) therefore erroneously treated the challenged IURC determination as solely one of fact.

AT&T takes issue with propositions (1) and (3), and we reply below to AT&T's arguments on each. First, however, we note that AT&T, apparently in an effort to hedge its bets, makes an assertion about the evidence that is not true. AT&T states,

> Using witness testimony and maps . . . , AT&T explained that its switches serve customers throughout an area 'the same or greater than' that served by each of Ameritech's tandem switches in Indiana. *See* SA 273-75, 277; 281-98.

In truth, AT&T did not explain "that its switches serve *customers*" throughout any area. The pages of the record cited by AT&T do not say, or even imply, anything about where AT&T's switches serve customers. Indeed, they say nothing that even indicates AT&T has any customers.

This is not, Ameritech has emphasized, a case about what the evidence showed, or whether the IURC weighed it properly. Why, then, does Ameritech focus on AT&T's mischaracterization of the evidence? Because the mischaracterization betrays AT&T's

recognition that the controlling law, correctly interpreted, required AT&T to prove something about where its switches actually serve customers, not just where they can serve customers.

A. RULE 711(A)(3) ALLOWS AT&T TO CHARGE THE TANDEM RATE ONLY IF ITS SWITCHES ACTUALLY SERVE GEOGRAPHIC AREAS COMPARABLE TO THE AREA SERVED BY AN AMERITECH TANDEM.

AT&T cites a Florida PSC analogy involving a landscaping company. AT&T Br. 46 n.17. This company, the Florida PSC said, can accurately advertise that it "serves Tallahassee and the surrounding area" if it has invested in the equipment necessary to serve any prospective customers in that area, without regard to where it actually has customers. But what if the company, instead of advertising its services, is applying for a State subsidy to monitor planting conditions in Tallahassee and the surrounding area, and one criterion for the subsidy is that the company must "serve Tallahassee and the surrounding area." Can the company, in that context, accurately state that it satisfies the criterion if it has only a handful of customers, all located in one Tallahassee suburb? Of course not. The State is looking for a company that, by virtue of the work it actually does throughout the Tallahassee area, is well positioned to monitor planting conditions throughout the area. Thus, the determination whether "serves" means "can serve" or "actually serves" depends on context.

In the case of Rule 711(a)(3), the context indicates that "serves" means "actually serves." The reciprocal compensation that Ameritech pays AT&T is to provide for the "recovery by [AT&T] of costs associated with transport and termination" on its network of calls that originate on Ameritech's network based on "the *additional costs* of terminating such calls." 47 U.S.C. § 252(d)(2). Thus, the statute that Rule 711(a)(3) is implementing focuses not on AT&T's investment in its network (*i.e.*, the costs AT&T incurs to make its switch capable of serving an

area), but on the additional costs of terminating the calls for which Ameritech is paying (*i.e.*, the actual service of an area).

AT&T makes much of a Ninth Circuit determination that a new entrant was entitled to the tandem rate "[e]ven though the court nowhere discussed evidence of customer locations." AT&T Br. 50-51. AT&T's treatment of this decision is disingenuous. The opinion does not discuss *any* evidence concerning the geographic area served by the new entrant's switch, and so casts no light on how the Ninth Circuit thought the test in Rule 711(a)(3) could be met. Indeed, the decision had nothing to do with how one determines whether a new entrant has satisfied the geographic coverage test; rather, the question was whether the arbitrator correctly denied the new entrant the tandem rate on the ground that the new entrant's switch performed only end office *functions* – an altogether different question. *See U.S. West Comm. v. Washington Utils. & Transp. Comm'n*, 255 F.3d 990, 994 (9th Cir. 2001).

AT&T also cites four federal court decisions that, AT&T says, "affirmed state commissions that awarded the tandem rate" without "require[ing] the new entrant to introduce evidence of its customer locations before affirming the award of the tandem rate." AT&T Br. 51. In none of these decisions, however, is there any indication whether the new entrant did or did not introduce such evidence in the state agency; or whether the state agency did or did not consider evidence of customer location in deciding that the requesting carrier was entitled to the tandem rate; or whether the incumbent carrier did or did not contend that any such evidence should be required.[13] These cases are inapposite.

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[13] Consider, for example, the first of these decisions, *U.S. West Comm. v. MFS Intelenet Inc.*, 193 F.3d 1112 (9th Cir. 1999). The only thing the decision says about the evidence that was presented in the state agency is that the parties "presented evidence in the arbitration hearing cont'd)

Thus, AT&T cites no federal court decision that actually supports its position. And AT&T's quarrels with Ameritech's decision fall flat – particularly when one looks at the cases. First and foremost, the district court's decision in *MCI v. Illinois Bell*, 1999 U.S. Dist. LEXIS 11418 (N.D. Ill. June 22, 1999) (*MCI Illinois*), is directly on point and strongly supports Ameritech's position. There, the district court rejected the new entrant's claim that it was entitled to charge the tandem rate, because

> During arbitration, MCI had less than 50,000 customers in the Chicago area. The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he "doubted" whether MCI had customers in every "wire center territory" within the Chicago service area. MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch. Or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of services to two different customers constitutes service to the entire geographical area between the customers. These are questions that MCI could have addressed, but did not.

Id. at *22 (citations and footnote omitted). AT&T tries to explain away *MCI Illinois* on the ground that the court went on to extol the evidence introduced in another case by a carrier that introduced a map not unlike the maps AT&T introduced in this case. Thus, AT&T concludes, *MCI Illinois* actually stands for the proposition that "state commissions may properly rely on evidence of network coverage like that relied on by AT&T here." AT&T Br. 49-50. This treatment of *MCI Illinois* is misleading, because it purposefully omits the fact that the evidentiary showing that the district court extolled also included (at *22) "some discussion of the location of [the carrier's local exchange customers]" – the very thing that is missing here.

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regarding the geographic area the MFS switch serves." *Id*. at 1124. For all one can glean from the opinion, there may have been ample evidence concerning customer location.

AT&T's attempt to distinguish away *MCI v. Michigan Bell*, 79 F.Supp.2d 768 (E.D. Mich. 1999), is also unavailing. That decision squarely held that FCC Rule 711(a)(3) "focuses on the area currently being served by the competing carrier, not the area the competing carrier may in the future serve," and rejected the competing carrier's claim to the tandem rate on that basis. *Id*. at 791. AT&T's observation that the competing carrier could not possibly be serving the area in question because it was not yet authorized to do so (AT&T Br. 49) is correct but irrelevant. The bottom line remains that what matters is "the area currently being served by the competing carrier."

AT&T is correct that the two state commission precedents Ameritech discussed are not controlling. AT&T Br. 50. They are certainly weighty, however: They ruled against AT&T on the same issue presented here, on the same ground asserted by Ameritech here, when the same AT&T witness presented the same sort of evidence (varying only in the particulars of state geography). *See* Ameritech Br. 16.

Those two arbitration decisions are entitled to at least as much weight as the arbitration decision by the Wireline Competition Bureau ("WCB") on which AT&T Relies. AT&T Br. 46-48. The WCB decision is not a declaration of controlling federal law. As AT&T notes, it was rendered pursuant to the authority that 47 U.S.C. § 252(e)(5) confers on the FCC to perform a State commission's arbitration duties when the State commission fails to do so. The WCB was standing in the shoes of the Virginia PUC when it rendered its decision, and its decision carries no more weight than would any State commission arbitration decision under section 252(b).

As the WCB explained in paragraph 1 of its decision, "Under the 1996 Act's design, it has been largely the job of the state commissions to interpret and apply [the FCC's] rules through arbitration proceedings. In this proceeding, the [WCB], acting through authority expressly

delegated from the [FCC], *stands in the stead of the Virginia State Corporation Commission.*" We expect that this order will provide a workable framework to guide the commercial relationship between the [parties] *in Virginia*." (Emphasis added.) This limiting reference to Virginia underscores the fact that the decision was not issued by the FCC, as AT&T suggests, but by a bureau of that agency whose function was merely to resolve a Virginia arbitration.[14] Indeed, the Wireline Competition Bureau's decisions, including this one, are subject to review and modification by the FCC on motion to a party.[15] The WBC arbitration decision cannot carry the same weight as an FCC Order when the FCC has authority to review and modify it.

In sum, the weight of authority supports the straightforward, in-context reading of FCC Rule 711(a)(3) that Ameritech urges here. To qualify for the tandem rate under the rule, a competing carrier must show that its switch actually, currently serves a geographic area comparable to the area served by the incumbent's tandem switch.

B. THE IURC MISINTERPRETED RULE 711(A)(3) BY INQUIRING INTO THE AREAS AT&T'S SWITCHES CAN SERVE, RATHER THAN THE AREAS THEY DO SERVE.

Ameritech demonstrated in its opening brief that the IURC awarded AT&T the tandem rate based on the areas AT&T's switches can serve, without regard to the area they do serve. Ameritech Br. 19-20. AT&T does not dispute this. In fact, AT&T agrees that the IURC "rejected Ameritech's . . . legal claims" (AT&T Br. 44) and "Ameritech's interpretation of the FCC's rule" (*id.* 45), and states that the IURC held, contrary to the interpretation of the rule that

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[14] That the WBC's decision may have the "same force and effect" as between the parties as a decision by the FCC would have (AT&T Br. 47 n.19) does not endow the decision with the precedential weight of an FCC decision.

[15] *See* 47 C.F.R. § 1.115(a).

Ameritech urges, "[i]t is sufficient for AT&T to show, under the FCC's rules, that its network *allows* it to terminate Ameritech Indiana's traffic over an area comparable to the territory served by Ameritech Indiana's tandem switches." *Id*. 44 (quoting SA35).

Thus, a holding by this Court that Rule 711(a)(3) requires the requesting carrier to make a showing about the area its switch actually serves, rather than the area its switch can serve, requires reversal of the IURC's determination.

C. THE DISTRICT COURT ERRONEOUSLY AFFIRMED THE IURC'S MISINTERPRETATION OF RULE 711(A)(3).

The district court's short discussion of the tandem vs. end office rate issue (A10-11) makes no mention of a possible distinction between a switch serving an area and being capable of serving an area. The court leapfrogged over Ameritech's argument, stated that the question was whether AT&T's switch serves a geographic area comparable to the area served by an Ameritech tandem without expressing any view one way or the other about what "serves" means; and affirmed the IURC on the ground that its determination was factual, and not arbitrary and capricious.

AT&T contends the district court did not ignore Ameritech's argument, but instead rejected it. AT&T Br. 45. At the end of the day, it makes no difference whether the court ignored the argument or rejected it, because it erred in either event. If this Court agrees that a requesting carrier is entitled to the tandem rate only if it proves something about the area its switch actually serves, it must reverse the district court's affirmance of the IURC because, as AT&T acknowledges, that is not how the IURC applied the rule.

III. The District Court Erred By Affirming The IURC's Requirement That Ameritech Splice Dark Fiber In Order To Make It Available To AT&T.

The Eighth Circuit, acting as a Hobbs Act Court, held that the 1996 Act requires unbundled access "only to an incumbent LEC's existing network – not to a yet unbuilt superior

one." *IUB I*, 120 F.3d at 813. Thus, Ameritech cannot be required to construct network elements in order to make them available to AT&T. *See* Am. Br. 24-26. AT&T does not dispute the proposition that *IUB I* prohibits UNE *construction* requirements, but argues that the splicing required by the IURC is only a *modification* to Ameritech's network to enable AT&T to access dark fiber network elements that already exist. AT&T Br. 40. AT&T's argument fails for two reasons.

First, the IURC did not impose the splicing requirement on that ground. The IURC's one-sentence rationale for imposing the splicing requirement (SA85) makes no mention of a distinction between construction and modification; does not acknowledge the existence of any limitation along the lines imposed by *IUB I*; and altogether disregards Ameritech's argument that a splicing requirement would violate the 1996 Act as authoritatively interpreted by the Eighth Circuit. The IURC's splicing requirement cannot be sustained on a ground the IURC did not even consider. *E.g.*, *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself"). And, indeed, the district court did not uphold the IURC on the basis now advanced by AT&T.[16]

Second, splicing is not in any event a "network modification required to give AT&T nondiscriminatory access to Ameritech's network elements." AT&T Br. 40. Rather, it is an alteration to the network elements themselves. Thus, the requirement is distinctly unlike the

[16] AT&T's assertion that the district court . . . held [the splicing requirement] was merely a network modification required to give AT&T access to Ameritech's network elements" (AT&T Br. 40) is dead wrong. All the district court said in affirming the IURC was that "Nothing in the administrative record indicates that this requirement forces Ameritech to provide access to dark fiber superior to its own access" (A17) – hardly a holding that splicing is a modification required to give AT&T access to network elements.

requirement that was upheld in *U.S. West Comm., Inc. v. Pub. Utils. Comm'n*, 55 F.Supp. 2d 968 (D. Minn. 1990) (AT&T Br. 40). There, the district court sustained a PUC-imposed requirement that the incumbent modify its network as "necessary for [the requesting] carrier to connect to [the incumbent's] network at any technically feasible point." 55 F. Supp.2d 982. This requirement did not change any network element to which the requesting carrier sought access. Rather, it merely enabled the requesting carrier to avail itself of its statutory right to interconnect with the incumbent "at any technically feasible point within the carrier's network" (47 U.S.C. § 251(c)(2)(B)).

AT&T also contends that the splicing requirement is lawful because it requires only that Ameritech do for AT&T that which Ameritech would do for itself. And AT&T asserts, in support of this theory, that Ameritech "ordinarily splices the segments of fiber for itself" (AT&T Br. 39), and that splicing dark fiber "is neither difficult nor extraordinary" (*id*. 38). The record, however, supports neither of those factual assertions. AT&T cites to SA365-66, 373 (*id*. 39) for the first assertion, but there is no mention in those pages (or anywhere else in the record) of Ameritech splicing dark fiber. For its second assertion, AT&T offers no cite to the record at all. AT&T Br. 38. Furthermore, Ameritech cannot lawfully be required to perform for AT&T whatever network construction it would perform for itself; such a requirement would swallow the rule that says Ameritech cannot lawfully be required to perform construction for AT&T.[17]

[17] AT&T's challenge to the Eighth Circuit's interpretation of the 1996 Act in *IUB I* (AT&T Br. 41) should be rejected for the reasons discussed above at 11 n.8.

CONCLUSION

For the reasons stated above and in Ameritech's opening brief, Ameritech respectfully requests that this Court reverse the district court's Judgment and direct the court to enter judgment in favor of Ameritech on Counts IV and XIX of Ameritech's Complaint and affirm the district court's Judgment in all other respects.

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Respectfully submitted,

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CERTIFICATION REGARDING WORD COUNT

The undersigned, counsel for Appellant/Cross-Appellee, certifies pursuant to Fed. R. App. P. 32(a)(7) that this brief complies with the type-volume requirements of the Court. Based on the word count of the word processing system used to prepare the brief (Word 9.0), the brief contains _____ words, including words in footnotes, but excluding the parts listed in Fed. R. App. P. 32(a)(7)(B)(iii).

_____

Theodore A. Livingston

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned, counsel for Appellant/Cross-Appellee, certifies that Appellant/Cross-Appellee has filed electronically, pursuant to Circuit Rule 31(e), a version of the brief and all of the appendix items that are available in non-scanned PDF format.

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Theodore A. Livingston

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on May 12, 2003, he caused two copies of and a diskette containing the foregoing Combined Response Brief and Reply Brief of Plaintiff-Appellant, Cross-Appellee Ameritech Indiana to be served as indicated on the following parties:

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ATTACHED SUPPLEMENTAL APPENDIX

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FCC ADOPTS NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL PHONE CARRIERS

Greater Incentives for Broadband Build-Out and Greater Granularity in Determining Unbundled Network Elements Are Key Commission Actions

Washington, D.C. – The Federal Communications Commission (Commission) today adopted rules concerning incumbent local exchange carriers' (incumbent LECs) obligations to make elements of their networks available on an unbundled basis to new entrants. The new framework provides incentives for carriers to invest in broadband network facilities, brings the benefits of competitive alternatives to all consumers, and provides for a significant state role in implementing these rules.

Today's action resolves various local phone competition and broadband competition issues and addresses a May 2002 decision by the U.S. Court of Appeals for the District of Columbia which overturned the Commission's previous Unbundled Network Elements (UNE) rules. Following is a brief summary of the key issues resolved in today's decision (a more detailed summary of today's action is attached):

1. **Impairment Standard** – A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic. Such barriers include scale economies, sunk costs, first-mover advantages, and barriers within the control of the incumbent LEC. The Commission's unbundling analysis specifically considers market-specific variations, including considerations of customer class, geography, and service.

2. **Broadband Issues** – The Commission provides substantial unbundling relief for loops utilizing fiber facilities: 1) the Commission requires no unbundling of fiber-to-the-home loops; 2) the Commission elects not to unbundle bandwidth for the provision of broadband services for loops where incumbent LECs deploy fiber further into the neighborhood but short of the customer's home (hybrid loops), although requesting carriers that provide broadband services today over high capacity facilities will continue to get that same access even after this relief is granted, and 3) the Commission will no longer require that line-sharing be available as an unbundled element. The Commission also provides clarification on its UNE pricing rules that will send appropriate economic signals to carriers.

3. **Unbundled Network Element Platform (UNE-P) Issue** – The Commission finds that switching - a key UNE-P element - for business customers served by high-capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment. Under this framework, states will have 90 days to rebut the national finding. For mass market customers, the Commission sets out specific criteria that states shall apply to determine, on a granular basis, whether economic and operational impairment exists in a particular market. State Commissions must complete such proceedings within 9 months. Upon a state finding of impairment, the Commission sets forth a 3 year period for carriers to transition off of UNE-P.

4. **Role of States** – The states have a substantial role in applying the Commission's impairment standard according to specific guidelines tailored to individual elements.

5. **Dedicated transport** – The Commission finds that requesting carriers are not impaired without Optical Carrier (or OCn) level transport circuits. However, the Commission finds that requesting carriers are impaired without access to dark fiber, DS3, and DS1 capacity transport, each independently subject to a route-specific review by states to identify available wholesale facilities. Dark fiber and DS3 transport also each are subject to a route-specific review by the states to identify where competing carriers are able to provide their own facilities.

With today's action, the Commission also opened a Further Notice of Proposed Rulemaking (FNPRM) seeking comment on whether the Commission should modify the so-called pick-and-choose rule that permits requesting carriers to opt into individual portions of interconnection agreements without accepting all the terms and conditions of such agreements.

-FCC-

Docket No.: CC 01-338

Wireline Competition Bureau Staff Contact: Tom Navin at 202-418-1580.

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ATTACHMENT TO TRIENNIAL REVIEW PRESS RELEASE

Order on Remand

- Local Circuit Switching – The Commission finds that switching - a key UNE-P element - for business customers served by high-capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment. Under this framework, states will have 90 days to rebut the national finding. For mass market customers, the Commission sets out specific criteria that states shall apply to determine, on a granular basis, whether economic and operational impairment exists in a particular market. State Commissions must complete such proceedings (including the approval of an incumbent LEC batch hot cut process) within 9 months. Upon a state finding of impairment, the Commission sets forth a 3 year period for carriers to transition off of UNE-P.

- Packet Switching – Incumbent LECs are not required to unbundle packet switching, including routers and DSLAMs, as a stand-alone network element. The order eliminates the current limited requirement for unbundling of packet switching.

- Signaling Networks – Incumbent LECs are only required to offer unbundled access to their signaling network when a carrier is purchasing unbundled switching. The signaling network element, when available, includes, but is not limited to, signaling links and signaling transfer points.

- Call-Related Databases – When a requesting carrier purchases unbundled access to the incumbent LEC's switching, the incumbent LEC must also offer unbundled access to their call-related databases. When a carrier utilizes its own switches, with the exception of 911 and E911 databases, incumbent LECs are not required to offer unbundled access to call-related databases, including, but not limited to, the Line Information database (LIDB), Toll Free Calling database, Number Portability database, Calling Name (CNAM) database, Operator Services/Directory Assistance databases, and the Advanced Intelligent Network (AIN) database.

- OSS Functions – Incumbent LECs must offer unbundled access to their operations support systems for qualifying services. OSS consists of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. The OSS element also includes access to all loop qualification information contained in any of the incumbent LEC's databases or other records.

- Loops

  - Mass Market Loops

    * Copper Loops – Incumbent LECs must continue to provide unbundled access to copper loops and copper subloops. Incumbent LECs may not retire any copper loops or subloops without first receiving approval from the relevant state commission.

    * Line Sharing – The high frequency portion of the loop (HFPL) is not an unbundled network element. Although the Order finds general impairment in providing broadband

services without access to local loops, access to the entire stand-alone copper loop is sufficient to overcome impairment. During a three-year period, competitive LECs must transition their existing customer base served via the HFPL to new arrangements. New customers may be acquired only during the first year of this transition. In addition, during each year of the transition, the price for the high-frequency portion of the loop will increase incrementally towards the cost of a loop in the relevant market.

* Hybrid Loops – There are no unbundling requirements for the packet-switching features, functions, and capabilities of incumbent LEC loops. Thus, incumbent LECs will *not* have to provide unbundled access to a transmission path over hybrid loops utilizing the packet-switching capabilities of their DLC systems in remote terminals. Incumbent LECs must provide, however, unbundled access to a voice-grade equivalent channel and high capacity loops utilizing TDM technology, such as DS1s and DS3s.

* Fiber-to-the-Home (FTTH) Loops – There is no unbundling requirement for new build/greenfield FTTH loops for both broadband and narrowband services. There is no unbundling requirement for overbuild/brownfield FTTH loops for broadband services. Incumbent LECs must continue to provide access to a transmission path suitable for providing narrowband service if the copper loop is retired.

- Enterprise Market Loops

  * The Commission makes a national finding of no impairment for OCn capacity loops.

  * The Commission makes a national finding of impairment for DS1, DS3, and dark fiber loops, except where triggers are met as applied in state proceedings. States can remove DS1, DS3, and dark fiber loops based on a customer location-specific analysis applying a wholesale competitive alternatives trigger.

  * Dark fiber and DS3 loops also each are subject to a customer location-specific review by the states to identify where loop facilities have been self-deployed.

- Subloops

  * See the copper loops summary above. In addition, incumbent LECs must offer unbundled access to subloops necessary for access to wiring at or near a multiunit customer premises, including the Inside Wire Subloop, regardless of the capacity level or type of loop the requesting carrier will provision to its customer.

- Network Interface Devices (NID) – Incumbent LECs must offer unbundled access to the NID, which is defined as any means of interconnecting the incumbent LEC's loop distribution plant to the wiring at the customer premises.

- Dedicated Interoffice Transmission Facilities – The Commission redefines dedicated transport to include only those transmission facilities connecting incumbent LEC switches or wire centers.

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* The Commission finds that requesting carriers are not impaired without access to unbundled OCn level transport.

* The Commission finds that requesting carriers are impaired without access to dark fiber, DS3, and DS1 transport, except where wholesale facilities triggers are met as applied in state proceedings using route-specific review.

* Dark fiber and DS3 transport also each are subject to a granular route-specific review by the states to identify where transport facilities have been self-deployed.

- Shared Transport – Incumbent LECs are required to provide shared transport to the extent that they are required to provide unbundled local circuit switching

- Combinations of Network Elements – Competitive LECs may order new combinations of UNEs, including the loop-transport combination (enhanced extended link, or EEL), to the extent that the requested network element is unbundled.

- Commingling – Competitive LECs are permitted to commingle UNEs and UNE combinations with other wholesale services, such as tariffed interstate special access services.

- Service Eligibility – Service eligibility criteria apply to all requests for newly-provisioned high-capacity EELs and for all requests to convert existing circuits of combinations of high-capacity special access channel termination and transport services. These criteria include architectural safeguards to prevent gaming.

  - Certification – Each carrier must certify in writing to the incumbent LEC that it satisfies the qualifying service eligibility criteria for each high-capacity EEL circuit.

  - Auditing – Incumbent LECs may obtain and pay for an independent auditor to audit compliance with the qualifying service eligibility criteria for high-capacity EELs. The incumbent LEC may not initiate more than one audit annually.

- Modification of Existing Network/"No Facilities" Issues – Incumbent LECs are required to make routine network modifications to UNEs used by requesting carriers where the requested facility has already been constructed. These routine modifications include deploying mutliplexers to existing loop facilities and undertaking the other activities that incumbent LECs make for their own retail customers. The Commission also requires incumbent LECs to condition loops for the provision of xDSL services. The Commission does not require incumbent LECs to trench new cable or otherwise to construct transmission facilities so that requesting carriers can access them as UNEs at cost-based rates, but it clarifies that the incumbent LEC's unbundling obligation includes all transmission facilities deployed in its network.

- Section 271 Issues – The requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling**,** under checklist items 4-6 and 10, regardless of any unbundling analysis under section 251. Where a checklist item is no longer subject to section 251 unbundling, section 252(d)(1) does not operate as the pricing standard. Rather, the pricing of such items is governed by the "just and reasonable" standard established under sections 201 and 202 of the Act.

- Clarification of TELRIC Rules – The order clarifies two key components of its TELRIC pricing rules to ensure that UNE prices send appropriate economic signals to incumbent LECs and competitive LECs. First, the order clarifies that the risk-adjusted cost of capital used in calculating UNE prices should reflect the risks associated with a competitive market. The order also reiterates the Commission's finding from the *Local Competition Order* that the cost of capital may be different for different UNEs. Second, the Order declines to mandate the use of any particular set of asset lives for depreciation, but clarifies that the use of an accelerated depreciation mechanism may present a more accurate method of calculating economic depreciation.

- Fresh Look – The Commission will retain its prior determination that it will not permit competitive LECs to avoid any liability under contractual early termination clauses in the event that it converts a UNE to a special access circuit.

- Transition Period – The Commission will not intervene in the contract modification process to establish a specific transition period for each of the rules established in this Order. Instead, as contemplated in the Act, individual carriers will have the opportunity to negotiate specific terms and conditions necessary to translate the Commission's rules into the commercial environment, and to resolve disputes over any new contract language arising from differing interpretations of the Commission's rules.

- Periodic Review of National Unbundling Rules – The Commission will evaluate these rules consistent with the biennial review mechanism established in section 11 of the Act. These reviews, however, will not be performed *de novo* but according to the standards of the biennial review process.

Further Notice of Proposed Rulemaking

- The Commission opens a further notice of proposed rulemaking to seek comment on whether to modify the Commission's interpretation of section 252(i) – the Commission's so-called pick-and-choose rule. The Commission tentatively concludes that a modified approach would better serve the goals embodied in section 252(i), and sections 251-252 generally, by promoting more meaningful commercial negotiations between incumbent LECs and competitive LECs.

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